

LIFE, DEATH AND THE LAW by Norman St. John-Stevas. [1961. London, Eyre & Spottiswoode, pp. 375 inc. index. £1.15.0.]

It is widely accepted that a great gulf separates Catholics from liberals. This view is not, however, shared by Mr. Norman St. John-Stevas, himself both a Catholic and a liberal. In his generally very comprehensive thoughtful, but often irritating book, he tries to show that a dialogue between the two is both possible and profitable, and that mutually acceptable conclusions can be arrived at. His attempt should be applauded, but it is a measure of the width of the gulf that exists, that many liberals are not likely to accept his bridge.

The first chapter is devoted to a theoretical discussion of the relation between law and morals, which is to form the framework of his subsequent treatment of specific issues. It is a highly unsatisfactory chapter. One reason for this is probably his failure to see that there are many relations between law and morals.<sup>1</sup> Without distinguishing them Mr. Stevas has discussed at least three such relations:

- (1) Is an immoral law a law? This is the nub of the Hart-Fuller controversy.
- (2) How far *as a matter of fact* has the law been influenced in its development by moral views? Professor Goodhart discusses this problem in his book *The English Law and the Moral Law*.
- (3) Is there a theoretical limit to the area of legislation? Should we have legislation against private acts which are not socially injurious? This is the question discussed by Sir Patrick Devlin (as he then was) in his Maccabaeian Lecture<sup>2</sup>, and by Professor Hart<sup>3</sup> and Mr. Richard Wollheim<sup>4</sup> in their criticisms of Sir Patrick.

These are all separate issues, and to show that law and morals are connected in (2), is not to show that they should not be separated in (3). Similarly, though it may be true that "Law is obeyed by the majority as much because it is felt to be morally binding as because of the knowledge that breach will lead to punishment", this is quite irrelevant to the Hart-Fuller controversy. We are not competent to discuss the first two relations between law and morals, and fortunately they have also no bearing on whether there should be laws against the use of contraceptives, artificial insemination and on the other subjects dealt with in the book. But in view of certain of Mr. Stevas' remarks, we feel compelled to make one or two points.

Commenting on Professor Hart's view that an unjust law remains law so long as the due forms have been observed, but that it may be too evil to be obeyed, Mr. Stevas says, with Professor Fuller, that this leaves unanswered the question "What is the obligation of fidelity to law?" He adds, "It cannot be a moral duty since morality has been excluded from the law." But the question of the validity of a law and the question of obedience to it are not identical. We may refuse to obey a law on many grounds. It may be purely on grounds of expediency or convenience. "No Parking" says the sign outside the tobacconist's shop, but we only want to go in for a minute, and in any case there is no policeman around! On the other hand the decision not to obey a law may be determined by strictly moral considerations. In neither of these cases need the validity of the law be doubted, and it is certainly not in the first case.

1. See H.L.A. Hart, *The Concept of Law*, Oxford 1961, Ch. IX.
2. *The Enforcement of Morals* by the Hon. Sir Patrick Devlin, Maccabaeian Lecture in Jurisprudence of the British Academy 1959, London 1969.
3. In an article, "Immorality and Treason", *The Listener*, July 80, 1969, pp. 162-3.
4. In an article, "Crime, Sin and Mr. Justice Devlin", *Encounter*, November, 1959, pp. 34-40.

Before turning to discuss the third relation between law and morals, we would like to comment on one other point which Mr. Stevas makes which seems to be most implausible. In trying to clarify the notion of "natural law", he defends Catholic natural lawyers against the charge of inconsistency for allowing the employment of false teeth and at the same time claiming that artificial contraception is contrary to natural law. According to him the term "unnatural" is only meaningful when considered in relation to human ends. "Hence contraceptives are rejected because they frustrate the purpose of human sexuality while false teeth are accepted because they further the process of human nourishment by assisting mastication." (p. 22/3). But many would reject the view that the sole purpose of human sexuality is procreation. Elsewhere in the book Mr. Stevas himself recognises this when he talks of the relational aspects of marriage. In an especially interesting discussion,<sup>5</sup> he tells us that it was perhaps the fear that the emphasis by certain Catholics on the importance of the relational aspect of marriage, might lead to a Catholic compromise on the morality of contraception, that led the Vatican in a decree of 1944 to categorically reassert the traditional primary and secondary ends of marriage. However, Mr. Stevas thinks that Catholics can have their cake *and* eat it, and he concludes the discussion on this question with a passage of great ingenuity:

Even if relational and conceptual ends of marriage are placed on equal basis, the condemnation of contraceptives is not excluded, for *coitus* can still be treated as a given act, the intrinsic nature of which is the giving and receiving of seed. Unless it is this, then neither its conceptual nor relational ends are achieved, and it becomes an onanistic act of self love, ontologically distinct from true *coitus*, (p. 86).

But, alas, this is sophistry. For if *coitus* with contraceptives is not "true *coitus*" then of course, by definition, it cannot achieve either the conceptual or the relational ends of *coitus*, properly so called. But it does not follow that this act, whatever it may be called, does not achieve the relational end of *marriage*. It would appear therefore that those cruel jibes against some Catholic lawyers and moralists were not without their point.

In discussions of whether there is a theoretical limit to the area of legislation, a very common answer is that there is none, and that this area can only be determined by practical considerations. It is to Mr. Stevas' credit that he does not accept such a solution. Rejecting Devlin's principle he says, "Sir Patrick leaves no basis of right for Church, conscience, or individual liberty, they are denied all save practical status, and their relationship with law can only be established by juggling with a number of social contingencies." We cannot agree more. It seems to us that those who give primacy to a mere practical status leave the door wide open for its gradual erosion. It may be that we have no time to cope with homosexuals to-day when there are murderers and thieves running loose, but to-morrow may be different: the police may not be busy, the jails may be empty. To-day we may not be able to supervise a man's life without posting a policeman in his room, but to-morrow we may be able to hide gadgets around which will spy on him without his knowledge and so not disturb him — until he does something wrong. To-day we may not feel intolerant enough, indignant enough or disgusted enough about adultery and fornication, but to-morrow we may, and what then can stop us from making them illegal?

But having agreed with Mr. Stevas thus far, we are unable to agree with him further. He thinks that "Moral offences not affecting the common welfare should be excluded from the scope of the law." This seems to be quite fair until he explains what he means by the "common good":

5. pp. 83-6.

Public order and civil peace; the security of the young, the weak, and inexperienced; the maintenance of the civilized decencies of public behaviour, all are included within the concept of the common good, but their enumeration does not exhaust it. Every community holds certain moral ideas and ideals of behaviour in common, concepts so fundamental that without them society would disintegrate, and which accordingly form part of the common good. (p. 38).

Obviously this concept plays a central part in Mr. Stevas' position, and yet in his section on "Assessing the Moral Consensus of a Community", he does not come to any definite conclusion and ends vaguely:

The law should be in touch with popular feeling, but not determined by it. It should strive to embody rational judgments and so modify public opinion, not blindly follow in the wake of emotional prejudice, (p. 43).

This does not tell us much. How are we to know which moral ideas and ideals of behaviour are so fundamental that without them society would disintegrate? Obviously Mr. Stevas does not mean disintegration in a physical sense. Like Devlin<sup>6</sup> he has a very wide conception of the disintegration of society, so that even certain changes in society would be regarded as destroying it. Thus to be consistent he would have to say that a barbaric society has the right to suppress humane influences because such influences destroy its barbaric character, and hence in his sense, the society disintegrates. The crucifixion of Christ and the persecution of the early Christians would be justified. This is the brutal but logical conclusion that any theory which gives society the right to defend the "common good", interpreted in Mr. Stevas' sense, leads to. Thus Fitzjames Stephen bluntly meets J. S. Mill's challenge:

Was Pilate right in crucifying Christ? I reply, Pilate's paramount duty was to preserve the peace of Palestine, to form the best judgment he could as to the means required for that purpose, and to act upon it when it was formed. Therefore, if and in so far as he believed, in good faith and on reasonable grounds, that what he did was necessary for the preservation of the peace of Palestine, he was right. It was his duty to run the risk of being mistaken, . . .<sup>7</sup>

But we feel that neither Mr. Stevas nor many other Christians would be prepared to accept this conclusion. And yet when the social order or the moral fabric of society is a Christian one, they are often too ready to invoke the "common good" in its defence. Thus Mr. Stevas' fundamental objection to the legalisation of A.I.D. is that our whole social system is based on the institution of the family and the monogamous character of marriage, and that A.I.D., if practised on an appreciable scale, would subvert this order and substitute a different pattern of relationships. We personally share Mr. Stevas' enthusiasm for the institution of the family centered round the monogamous nature of marriage, but we do not see why other people who prefer "a different pattern of relationships" should not have things their way.

Mr. Stevas continues, "With the abandonment of the principle that child bearing is only lawful with the co-operation of the parties to the marriage contract, the way would be opened for the bearing of children by unmarried women." But the way was already open without artificial insemination. We *have* unmarried mothers. Would Mr. Stevas invoke legal penalties against them? We also fail to see why he thinks that the bearing of children by unmarried women through A.I.D. is bad. We should have thought that A.I.D. performs a useful service to those

6. For this criticism of Devlin, see R. Wollheim, *op. cit.*, pp. 39-40.

7. *Liberty, Equality, Fraternity*, 2nd ed., London 1874. p. 94.

women who desire to have children but do not desire to have a husband or cannot find one, a point of view which Mr. Stevas himself mentions but without much appreciation. However this is not crucial to our argument, which is simply that the freedom of these women should not be interfered with so long as they treat their children reasonably well.

We are unimpressed by visions of a brave new world of human stud farms. This nightmare is not more likely, and probably even less so, to come true than fears that voluntary sterilization would lead to another Nazi Germany, which, as Mr. Glanville Williams has pointed out,<sup>8</sup> has been proved wrong by the American experience.

In opposing voluntary euthanasia, Mr. Stevas uses the 'wedge' argument. He thinks that the legalisation of voluntary euthanasia would lead to compulsory euthanasia for deformed persons, imbeciles and for the old. But we feel that he exaggerates the possibility of compulsory euthanasia being accepted. In any case the good done by voluntary euthanasia is so great that we should gladly run the risk of compulsory euthanasia. But Mr. Stevas would not agree that voluntary euthanasia is good. Man, according to him, has no absolute control over life, but holds it in trust for God. To use this argument in order to prevent the dying and suffering man from being allowed to opt for euthanasia is certainly brutal. It is to regard him as a pawn in God's service, to sacrifice him to God. It is a conception of man which is so inhumane and repugnant that it makes all of Mr. Stevas' concern over the compulsory euthanasia of the deformed, the aged and the imbecilic seem gratuitous. Yet we think that Mr. Stevas has a deep-seated and generally pervasive humanity which he shows in asking Christians to welcome the reform of the law against attempted suicide "not only on grounds of social policy but of charity." Should not the same charity be extended to the patient who asks for euthanasia? Why has Mr. Stevas allowed his charity and his humanity to suffer such a disastrous lapse?

Mr. Stevas also shows a lapse of careful thought when he argues against voluntary contraceptive sterilization. It deprives the state, he says, of potentially healthy stock: it removes the fear of pregnancy and thus may increase immorality which in turn may lead to an increase in venereal disease.

It is perhaps rather unfair and even puerile, to remind Mr. Stevas that celibate priests also deprive the state of potentially healthy stock, and yet what else could we do with such a silly argument except to expose it to all its silly conclusions? In fact all his arguments could be used with almost equal force against the practice of contraception, the legalisation of which he does not oppose.

Fear of sexual immorality seems to have gripped our age. We see immorality everywhere and regard it as a threat to our civilisation. But we are in danger of allowing this fear to vitiate our judgments and to block social reforms. In England the battle to make Saturday a half working day was opposed by people who argued that this would lead to an increase in immorality.<sup>9</sup> To-day this sounds rather stupid, but it may be that many of the arguments employed nowadays are equally stupid. Many believe that sexual immorality is greater now than ever before and

8. *The Sanctity of Life and the Criminal Law*, London 1958, p. 91.

9. And, on the other hand, *those* who fought for it claimed that it would preserve people from immorality. See E. S. Turner, *Roads to Ruin*. London 1950, Ch. 8.

that it is still going up. But perhaps we tend to exaggerate our sins. It has been estimated that London at the height of Victorian piousness housed 7,000 prostitutes and 2,000 brothels, and also had an unparalleled volume of pornographic literature.<sup>10</sup> But if it were true that sexual immorality is at its peak to-day, then religion faces a big challenge. For it to seek the ally of the law is for it to confess its own inadequacy in meeting this challenge.

We cannot discuss everything in Mr. Stevas' book. There is much else that we disagree with, but also much else that we agree with. If we have underlined our disagreements with him more than our agreements, it is because we wish to show that his conception of the "common good" can often lead to illiberal consequences. But the book as a whole has a wealth of material which no amount of criticisms should prevent from being read.

TEN CHIN LIEW.